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RE: Public Comment Opposing Proposed Rules on Security Bars and Processing - RIN 1615-AC57 / USCIS Docket No. 2020-0013; RIN 1125-AB08 / A.G. Order No. 4747-2020

Innovation Law Lab respectfully submits this comment on the proposed amendments to the regulations governing asylum eligibility on public health grounds, published on July 9, 2020. These regulations would effectively eliminate the availability of asylum in the United States, and are nothing more than a thinly-veiled attempt to close the border to and limit immigration to the United States. These changes attempt to unlawfully rewrite U.S. law and sweep aside our international and humanitarian obligations. The administration cannot be allowed to use the COVID-19 pandemic as a pretext for closing the country's doors to vulnerable individuals seeking humanitarian relief. We urge the agencies to reject the proposed changes in their entirety.

Innovation Law Lab is a nonprofit organization dedicated to upholding the rights of immigrants and refugees. Founded in 2014 in response to the mass detention and deportation of asylum-seeking immigrant families, Innovation Law Lab specializes in the creation of scalable, highly replicable, and connected sites of resistance that create paradigm shifts in immigration representation, litigation, and advocacy. By bringing technology to the fight for immigrant justice, Innovation Law Lab empowers advocates to scale their impact and provide effective representation to immigrants in detention and in hostile immigration courts across the country. Innovation Law Lab works directly with low-income immigrants and the pro bono attorneys who serve them, providing legal services, direct representation, and tactical support before United States Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR).

We describe below our opposition to the proposed changes to asylum eligibility. Omission of any proposed change from this comment should not be interpreted as tacit approval. We oppose all aspects of the proposed implementation.

I. The bases for the proposed regulation are pretextual

The proposed regulations state that barring asylum seekers is necessary to protect against the spread of diseases such as COVID-19. Once again, the government seeks to invoke “national security” as a grounds for impermissibly excluding certain groups of people from this country. But no evidence suggests that asylum seekers spread COVID-19 to the United States, nor that prohibiting asylum seekers from entering at an earlier date would have halted or slowed the spread of the virus in the U.S.¹ Indeed, the risk actually runs the opposite way- asylum seekers likely place themselves at greater risk of contracting COVID-19 by coming to the United States because the United States has one of the highest infection rates in the world.²

The proposed regulations state that these rules are necessary due to the risk of spread to Department of Homeland Security officials and people imprisoned in detention centers. But this risk could be more effectively addressed by eliminating the use of detention centers altogether, which are breeding grounds for infection regardless of whether these proposed rules go into effect, and are otherwise unnecessary and inhumane.³ Indeed, the proposed rules seem designed to punish asylum seekers- including some who are currently in dangerous U.S. detention centers- for the United States’ own failure to effectively control the outbreak of COVID-19 and other communicable diseases. Moreover, it is worth noting that the United States continues to deport COVID-19-infected immigrants to their countries of origin, playing a significant role in the global spread of the pandemic.⁴ The U.S.’s continued deportation of immigrants with COVID-19 is clearly at odds with the stated purpose of this proposed regulation and demonstrates its pretextual nature.

¹ See Mike Baker, *When Did the Coronavirus Arrive in the U.S.? Here’s a Review of the Evidence*, NYTimes, May 15, 2020,

<https://www.nytimes.com/2020/05/15/us/coronavirus-first-case-snohomish-antibodies.html>

² Jessica Chase, *Charts: How The U.S. Ranks On COVID-19 Deaths Per Capita — And By Case Count*, NPR, Aug. 5, 2020,

<https://www.npr.org/sections/goatsandsoda/2020/08/05/899365887/charts-how-the-u-s-ranks-on-covid-19-deaths-per-capita-and-by-case-count>

³ Tom Jawetz and Nicole Prchal Svajlenka, *Data on the Coronavirus Outbreak in Immigration Detention Offer More Questions than Answers*, Center for American Progress, June 16, 2020,

<https://www.americanprogress.org/issues/immigration/news/2020/06/16/486338/data-coronavirus-outbreak-immigration-detention-offer-questions-answers/>

⁴ Caitlin Dickerson & Kirk Semple, *U.S. Deported Thousands Amid COVID-19 Outbreak. Some Proved to be Sick*, NYTimes, Apr. 18, 2020, <https://www.nytimes.com/2020/04/18/us/deportations-coronavirus-guatemala.html>.

Additionally, the proposed regulations would allow the Department of Homeland Security to bar asylum seekers who may have other diseases, many of which are treatable and do not pose a risk of rapid and widespread transmission, including gonorrhea, syphilis, tuberculosis, and leprosy.⁵ It is also deeply troubling that ineligibility determinations would be made not by public health officials or those with medical training but by government officials untrained in and unfamiliar with the symptoms of communicable diseases. The regulations also leave undefined key terms like what would make a disease “prevalent” in a country for the purposes of triggering the ban. Given the lack of danger to the public and the availability of treatments for such diseases, there is no valid public health justification for denying asylum on such bases. As health experts have explained, the United States can- and should- take reasonable measures to safeguard both public health and the health and safety of persons fleeing persecution to seek asylum here.⁶

II. The proposed regulations would violate the right to protection under U.S. and international law

The proposed regulations would unlawfully deny individuals fleeing violence and persecution the right to seek asylum. The regulations would effectively act as a universal and categorical bar to asylum during the entirety of the COVID-19 pandemic, and perhaps beyond; would allow summary deportations without a hearing; and would send thousands of asylum seekers back to countries where they face harm, violence, and death. This unprecedented attempt to use public health to block the arrival of asylum seekers violates both U.S. law governing asylum procedures and our international obligation of non-refoulement. Barring individuals from asylum on unsupported health and safety grounds allows the U.S. government to avoid the responsibility of making an assessment of an individuals’ actual fear of persecution, which will inevitably lead to a violation of our commitments to non-refoulement. As the United Nations High Commissioner for Refugees has made clear, states may not use the COVID-19 pandemic as an excuse to categorically block the right to seek asylum.⁷

The regulation uses the “danger to the security of the United States” ineligibility ground to accomplish this goal. *See* 8 U.S.C § 1158(b)(2)(A)(iv), 8 U.S.C § 1231(b)(3)(B)(iv). But this provision was never intended to be used to block the right to asylum on public health grounds.

⁵ See Pooja Agrawal, et.al., *Letter to Secretary Wolf and Attorney General Barr Signed by Leaders of Public Health Schools, Medical Schools, Hospitals, and Other U.S. Institutions*, Aug. 6, 2020, <https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-proposed-rule-would-bar-refugees-asylum-and-and>.

⁶ See, e.g., *Public Health Measures to Safely Manage Asylum Seekers and Children at the Border*, Human Rights First, May 15, 2020, <https://www.humanrightsfirst.org/resource/public-health-measures-safely-manage-asylum-seekers-and-children-border>.

⁷ UNHCR, *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response*, Mar. 16, 2020, available at <https://www.refworld.org/docid/5e7132834.html>.

As was clearly understood when the United States ratified the Refugee Protocol, because “refugees are by definition without a homeland, deportation of a refugee is a particularly serious matter, and it would not be humanitarian to deport a refugee for reasons of health.”⁸ Indeed, as UNHCR has emphasized, the national security exception to the 1951 Convention and Protocol should only be employed when “(1) there [is] a rational connection between the removal of the refugee and the elimination of the danger: (2) *refoulement* [is] the last possible resort to eliminate the danger; and, (3) the danger to the country of refuge . . . outweigh[s] the risk to the refugee upon *refoulement*.”⁹ None of those three conditions apply here.

Moreover, the regulation would allow asylum officials to send persons eligible for protection under the Convention Against Torture (CAT) to a third country instead of allowing them to seek humanitarian protection in the United States. Congress intentionally set a low screening threshold for exemption from expedited removal for individuals who may be subject to torture in their country of citizenship, with the purpose of ensuring that persons are not deported to death and torture. Allowing removal to a third country at this early screening stage means that no thorough record will exist as to the person’s risk of torture in that third country- a risk that may be very high considering the permeability of borders and easy movement of persecutors between Mexico and the Northern Triangle countries of Central America.¹⁰ The wording of the proposed change is so broad that it could even be read to allow for removal of asylum-seeking persons in regular removal proceedings to third countries before the adjudication of their asylum applications. Given the disastrous humanitarian consequences of the administration’s existing attempts to force asylum seekers to remain in Mexico while pending adjudication of their claims under the Remain in Mexico program,¹¹ this further broadening would cause even more harm to vulnerable asylum-seekers and should therefore not be implemented.

The proposed regulations would unlawfully overwrite the United States’ asylum laws and violate our international obligations, and thus should not be allowed to go into effect.

⁸ *Message from the President of the United States: Transmitting the Protocol Relating to the Status of Refugees, Done at New York on January 31, 1967, available at* <https://books.google.com/books?id=09Xg93YBnXEC&lpg=PR8&ots=-VjAyjyGjg&dq=%22among%20the%20rights%20which%20the%20Protocol%20would%20guarantee%20to%20refugees%20is%20the%20prohibition%22&pg=PR8#v=onepage&q&f=false>.

⁹ Advisory Opinion from the Office of the United Nations High Commissioner for Refugees (UNHCR) on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees, Jan. 6, 2006, *available at* <https://www.refworld.org/docid/43de2da94.html>.

¹⁰ *See, e.g., Insight Crime & the Center for Latin American & Latino Studies, American University, MS-13 In the Americas: How the World’s Most Notorious Gang Defies Logic, Resists Destruction*, <https://www.insightcrime.org/wp-content/uploads/2018/02/MS13-in-the-Americas-InSight-Crime-English-3.pdf> (describing the transnational reach of the violent gang MS-13).

¹¹ *See* Publicly reported cases of violent attacks on individuals returned to Mexico under the “Migrant Protection Protocols”, as compiled by Human Rights First, <https://www.humanrightsfirst.org/sites/default/files/PubliclyReportedMPPAttacks5.13.2020.pdf>.

III. The proposed regulations would violate the due process rights of immigrants and people fleeing persecution

The proposed regulations include a host of policies that would violate the due process rights of persons seeking humanitarian protection in the United States. First, as described above, the proposed changes would allow removal of refugees to a third country, pretermittting the ability to seek asylum and other protections in the United States. Allowing such removal to occur at the whim of a Department of Homeland Security officer, without a hearing in immigration court or the right to full development of a record on the request for asylum, is a clear violation of due process. Additionally, the regulations set a high unrealistic standard for credible fear interview passage. The proposed regulations would allow interviewers to consider potential bars to asylum that should be fully considered by an immigration judge, after an applicant has had an opportunity to consult with counsel and gather evidence in support of their claim. Additionally, the changes would require a person who has been found ineligible for asylum and withholding of removal to affirmatively assert their CAT eligibility at the credible fear interview stage- an unreasonable expectation to have of unrepresented asylum seekers who are often unfamiliar with what protections are available to them. Given the serious due process harms that would be wrought by these proposed changes, these regulations should not be allowed to take effect.

IV. The proposed regulations will further the existing immigration court backlog and reduce efficiency

Contrary to the regulations' assertions, the proposed regulations will reduce the efficiency of the Departments and will cause even greater backlogs in immigration court. Under the new rules, negative credible fear determinations due to the mandatory bar may be appealed to an immigration judge. An inevitable increase in negative credible fear determinations will increase the number of cases that are sent to immigration judges, exacerbating the already extensive immigration court backlog. Moreover, requiring consideration of this new bar in asylum and withholding of removal cases will lend itself to inconsistencies in case adjudications due to the fast-changing nature of the pandemic. The lack of guidance on implementation of this bar will lead to uneven and inconsistent enforcement. The proposed regulations state that people can be deemed ineligible for asylum or withholding of removal based on being a danger to security of the United States, but the proposed regulations do not state how this factor should be weighed, or how and to what extent other factors (such as length of time in a country, level of impact to that country, symptoms or lack thereof, other factors that render someone more or less susceptible, etc.) should be weighed in the analysis.

Finally, the proposed changes fail to acknowledge the many possible conflicts between these proposed regulations and the myriad of regulatory changes to the asylum process proposed in June of this year. *See* 85 Fed. Reg. 36,264 (June 15, 2020). The administration does not even

mention the prior proposed rule or attempt to reconcile the two rules. This is further proof that these proposed regulations merely seek to empower immigration judges and Department of Homeland Security officers to categorically deny asylum and related relief without any valid justification or reasoning.

The proposed changes should be rejected in their entirety.



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